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No. ..-...

IN THE

Supreme Court of the United States

October Term, 1982

DANIEL LEE BEAVER,

Petitioner,

vs.

BERTRAM GRIGGS, Warden,

Respondent.

PETITION FOR WRIT OF CERTIORARI.

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Questions Presented.

1. May the petitioner's right to a writ of habeas corpus be denied despite the fact that he did exhaust his state court remedies?

2. May a Federal Circuit Court deny a rehearing despite the fact that one Circuit Judge was unavailable for oral argument?

TABLE OF CONTENTS

	Page
Questions Presented	i
Reference to Unofficial Opinions	1
Statement of Jurisdiction of This Court	1
The Statute Which the Case Involves	1
Statement of the Case	1
Federal Jurisdictional Statement	3
Argument	4

APPENDIX

Memorandum Filed: January 5, 1983 ..... App. p.	1
Order. Petition for Rehearing, Filed January 17, 1983, Is Denied	3
Order. Unpublished Memorandum Filed January 5, 1983, Is Amended	4

TABLE OF AUTHORITIES

Case

Moles v. Regents of the University of California, S.F. 24442 (reported in Los Angeles Daily Journal, December 10, 1982, p. 1)	5, 6

Statutes

California Penal Code, Sec. 1203.06(a-1)	2
California Penal Code, Sec. 12021	2, 4
California Penal Code, Sec. 12022.5	2
United States Code, Title 28, Sec. 2254	1, 3

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Reference to Unofficial Opinions.

A memorandum opinion was filed January 5, 1983 by the United States Court of Appeals for the Ninth Circuit, No. 82-5293, D.C. No. CV 81-166-LTL.

An order was filed by the Ninth Circuit on February 11, 1983 denying petitioner's petition for rehearing.

Statement of Jurisdiction of This Court.

The judgment of the Ninth Circuit filed January 5, 1983 and the rehearing thereof, denied on February 11, 1983 are to be reviewed.

The Statute Which the Case Involves.

Section 2254 of Title 28 of the United States Code.

Statement of the Case.

In an information filed by the District Attorney of Los Angeles County, petitioner was charged in count I with murder. It was also alleged that during the commission of

the offense petitioner used a firearm within the meaning of sections 1203.06(a-1) and 12022.5 of the California Penal Code. In count II, petitioner was charged with being an ex-felon in possession of a concealable firearm, in violation of section 12021 of the California Penal Code.

Petitioner pleaded not guilty and denied the firearm allegation and special circumstances allegation. Petitioner waived a trial by jury and was found guilty of voluntary manslaughter and of the offense charged in count II. The court found the use allegation true and also found that petitioner has sustained a prior felony conviction.

Petitioner was sentenced to the state prison for the middle-base term of three years for voluntary manslaughter. An additional two years were imposed for the use of a firearm. The court struck the prior conviction allegation. The sentence of 16 months imposed on the count II offense was ordered stayed pending petitioner's appeal, said stay to become permanent upon successful completion of the sentence on count I.

Petitioner appealed from the judgment. Petitioner also filed a petition for writ of habeas corpus in the California Court of Appeal. The California Court of Appeal, Second Appellate District, Division Five, affirmed the judgment and denied the petition for writ of habeas corpus. Petitioner filed a petition for hearing in the California Supreme Court as to the petition for writ of habeas corpus and the judgment. On December 24, 1980, the California Supreme Court denied the petition for hearing.

On January 14, 1981, petitioner filed a petition for writ of habeas corpus in the United States District Court for the Central District of California. On February 6, 1981, respondent filed a return to the petition for writ of habeas corpus on the issue of exhaustion only. On February 26, 1981,

petitioner filed a traverse to the return. On March 3, 1981, the United States District Court ordered a return on the merits. On March 25, 1981, respondent filed a return on the merits. On April 13, 1981, petitioner filed a traverse. On May 4, 1981, the United States Magistrate recommended that the petition be denied without prejudice. On May 27, 1981, the judgment denying the petition was entered.

Federal Jurisdictional Statement.

Petitioner filed his petition for writ of habeas corpus pursuant to section 2254 of Title 28 of the United States Code. On May 27, 1981, a judgment denying the petition was entered. On June 24, 1981, petitioner's notice of appeal was timely filed.

ARGUMENT.

The Memorandum Opinion of the Ninth Circuit, filed on January 5, 1983, indicates that a reason for affirming the United States District Court's decision was ". . . that petitioner failed to raise in the California Supreme Court his claim, raised in the district court, that California Penal Code § 12021 was unconstitutional as applied to him on the ground that he was not adequately represented by counsel at the time of his prior conviction in Alabama." (As a matter of correction only, Petitioner-Appellant would like to respectfully point out that the prior conviction was in Arkansas, not Alabama. This was corrected by the Ninth Circuit by an order filed February 11, 1983.)

The Court's attention is directed to Petitioner-Appellant's Petition for Hearing filed with the Supreme Court of the State of California on December 1, 1980:

> "The opinion of the court of appeal did not address the racial/ethnic discrimination argument made under *Carolene, supra*, in relation to 12021 unjustly treating ghetto persons convicted of a previous crime in a southern state where justice is unevenly applied.", Petition for Hearing, page 10, lines 20-24.

This clearly encompasses the issue that the Court's Memorandum Opinion said was not raised. Note that in Petitioner-Appellant's Opening Brief in the State Court of Appeal under Section 12021, Item Number 3 dealt with the issue of inadequacy of counsel in the Arkansas Judgment. Item Number 3 began on line 26 of page 37 and continued through and including line 21 of page 39. The previously mentioned paragraph on page 10 of the State Supreme Court Petition raises the 12021 issue and thus raises the very matter which this Court's Memorandum Opinion says was not raised. It was certainly not necessary to burden the State Supreme Court with a total repeat of the State Court of

Appeal brief, which would have been available to them had they granted the Petition for a Hearing.

Petitioner-Appellant wishes to stress that the rights of a prisoner to a federal writ of habeas corpus cannot be dismissed for mere hairsplitting technicalities. As we stated in our Opening Brief to the Ninth Circuit:

> "Finally, neither the Appellee nor the Magistrate addressed the U. S. Supreme Court cases cited by Appellant on page 5, lines 10-18 of his Traverse filed February 26, 1981, which stand for the general rule that procedural defects do not bar federal habeas corpus relief on the basis of lack of exhaustion of state remedies. *Humphrey v. Cady* 92 S. Ct. 1048, 405 U.S. 504, 31 L.Ed. 2d 394, *Harris v. Nelson* 89 S. Ct. 1082, 394 U.S. 286, 22 L.Ed. 2d 28a (reh. den.), *Thomas v. State of Arizona* 78 S. Ct. 885, 356 U.S. 390, 2 L.Ed. 2d 863 reh. den., *U.S. ex rel. Nola v. Fay* 300 F.2d 345, affirmed 83 S. Ct. 822, 372 U.S. 391, 9 L.Ed. 2d 837." Petitioner/Appellant's Opening Brief, page 19, lines 17 through 27.

It is clear that the Ninth Circuit erred by contradicting the holdings and spirit of these aforementioned cases. Disregarding the United States Supreme Court holdings of these cases denied DANIEL LEE BEAVER his constitutional right to a writ of federal habeas corpus.

The Petitioner draws the Court's attention to the material fact that Circuit Judge Reinhardt was unavailable for oral argument. The Presiding Circuit Judge indicated that he would listen to a tape recording of the oral argument. Petitioner contends that there is a vast difference between listening to a tape recording and having a meaningful dialogue with counsel. In the recent case of *Moles v. Regents of the University of California*, S.F. 24442, reported in Los Angeles Daily Journal, December 10, 1982, page 1, the

California Supreme Court ruled unanimously that an appellate justice who has not heard arguments ordinarily may not participate in deciding that case. "This right to oral argument would be an empty right indeed if it did not encompass the right to have one's case decided by the justices who heard the argument. No provisions of the Constitution, no statute, nor rule of court may be found which — expressly or impliedly — authorizes a presiding justice to alter the composition of the panel of justices assigned to consider and determine an appeal *after* oral argument." (emphasis added) *Moles, supra.*

In view of the above items of material fact and law, it is respectfully requested that Petitioner be granted a Writ of Certiorari.

DATED: April 6, 1983.

Respectfully submitted,
LEON L. VICKMAN,
A Law Corporation,
By LEON L. VICKMAN,
Attorney for Petitioner.

APPENDIX.

Memorandum.

United States Court of Appeals for the Ninth Circuit.

Daniel Lee Beaver, Petitioner-Appellant, vs. Bertram Griggs, Warden, Respondent-Appellee. No. 82-5293. D.C. No. CV 81-166-LTL.

Filed: January 5, 1983.

Appeal from the United States District Court for the Central District of California. Honorable Lawrence T. Lydick, District Judge, Presiding.

Argued and Submitted November 1, 1982.

Before: FLETCHER, NELSON, and REINHARDT, Circuit Judges.

Daniel Lee Beaver appeals from the denial of his petition for a writ of habeas corpus in the district court for failure to exhaust state remedies as required by 28 U.S.C. § 2254(b) (1976).

Beaver filed a consolidated petition for hearing and for a writ of habeas corpus in the California Supreme Court. The petition, which was filed late and did not cite to the record as required by California Supreme Court Rule 15(a), was denied without comment or citation. A federal magistrate concluded that the state supreme court had denied the petition on the basis of procedural defects and not on the merits, and therefore petitioner's state remedies had not been exhausted. The district court agreed. We affirm, but on different grounds.

A close review of the record reveals that petitioner failed to raise in the California Supreme Court his claim, raised in the district court, that California Penal Code § 12021 was unconstitutional as applied to him on the ground that he was not adequately represented by counsel at the time of his

prior conviction in Alabama. Therefore, petitioner has not exhausted his state remedies with respect to all issues, and we are without jurisdiction. *Rose v. Lundy*, ... U.S. ...., 102 S. Ct. 1198, 1205 (1982).

AFFIRMED.

Order.

United States Court of Appeals for the Ninth Circuit.

Daniel Lee Beaver, Petitioner-Appellant, v. Bertram Griggs, Warden, Respondent-Appellee. No. 82-5293. D.C. NO. CV 81-166-LTL. Central District, California.

Filed: February 11, 1983.

Before: FLETCHER, NELSON, and REINHARDT, Circuit Judges.

Appellant's petition for rehearing, filed January 17, 1983, is

DENIED.

Order.

United States Court of Appeals for the Ninth Circuit.

Daniel Lee Beaver, Petitioner-Appellant, v. Bertram Griggs, Warden, Respondent-Appellee. No. 82-5293. D.C. NO. CV 81-166-LTL. Central District, California.

Filed: February 11, 1983.

Before: FLETCHER, NELSON, and REINHARDT, Circuit Judges.

The unpublished Memorandum filed January 5, 1983, is amended as follows:

Slip page 2, second line: "Alabama" is corrected to read "Arkansas."